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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 195

MARTIN G. TAUB; JOSEPH B. WOHLMAN; ABNER B. TAUB; and CHARLES HOFFMAN, of Jersey City, New Jersey, *Petitioners,*

v.

CHESTER BOWLES, PRICE ADMINISTRATOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

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v.

CHESTER BOWLES, PRICE ADMINISTRATOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petition for writ of certiorari is directed against a judgment of the United States Emergency Court of Appeals dismissing petitioners' complaint in that Court for lack of jurisdiction. Petitioners were indicted in the United States District Court for the District of New Jersey for conspiracy to commit offenses against the United States, 18 U. S. C. A. 88. These offenses include inter alia violations of Section 4 (a) of the Emergency Price Control Act of 1942, as amended, (Act January 30, 1942, C. 26, Stat. 23), and Maximum Price Regulations 193 and 445 issued by the Price Administrator under the presumed authority of said

Act. On October 10, 1944, pursuant to and in compliance with the provisions of Section 204(e), Emergency Price Control Act of 1942, as amended, petitioners herein duly filed their petition[1] with the United States District Court for the District of New Jersey praying for leave to file a complaint in the United States Emergency Court of Appeals. Said petition was granted on November 6, 1944.[2]

On December 5, 1944, petitioners seasonably filed their complaint in the court below, said cause being docketed as No. 188 in that court. The complaint[3] specifically challenged the validity of Maximum Price Regulations 445 and 193, Section 1420.13, and generally all regulations, price schedules and orders purporting to regulate intoxicating liquors (termed "distilled spirits" in the regulations) under authority of the Emergency Price Control Act of 1942, as amended. The grounds upon which petitioners laid their complaint as summarized in the opinion[4] of the court below were:

> ". . . that federal regulation of prices of intoxicating liquor conflicts with the Twenty-first Amendment to the Constitution; and, in the alternative, if the regulations are deemed within the federal constitutional power, that intoxicating liquor is not a commodity which Congress intended to be regulated; that such regulation subserves no purpose of the Act, and that the regulations are invalid by reason of failure of the Administrator to obtain approval of the Secretary of Agriculture as required by Section 3, Subsections a, b, c, d, and 4 of the Act."

The Price Administrator moved to dismiss on various grounds, but one of which is pertinent, namely, that the case at bar, being one for conspiracy to violate the provisions of the Emergency Price Control Act of 1942, as amended, is

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[1] R. 4-12.
[2] R. 13-15.
[3] R. 1-3.
[4] R.82.

* All record references are to pagination in Transcript of Record filed in United States Supreme Court.

not a criminal proceeding brought pursuant to Section 205 of that Act, in consequence of which the United States Emergency Court of Appeals is without jurisdiction to determine the validity of regulations of the Price Administrator thus brought into issue.[5] The court below held[6] (one judge dissenting in part):

> ". . . that Congress has not given us jurisdiction under Section 204 (e) (1) to entertain a complaint challenging the validity of a regulation when the charge is conspiracy."

It accordingly dismissed the complaint, after undertaking by way of obiter to dispose of the question of validity on the merits,[7] although the factual record of necessity was incomplete, the case not having reached a state where, in view of the Court's contention that it lacked jurisdiction, evidence could have been properly offered.[8]

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court to entertain this petition for a writ of certiorari to review the judgment of the United States Emergency Court of Appeals is invoked under favor of Section 204 (d) of the Emergency Price Control Act of 1942, as amended, (Title 50, Appendix U. S. C. A., Section 924 (d)):

> "(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, Title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposi-

[5] R. bottom 31-40.
[6] R. 85.
[7] R. 85-88.
[8] R. top 44.

tion of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 (section 902 of this Appendix), of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

The judgment below against which this petition for a writ of certiorari is directed was entered on June 6, 1945.

QUESTIONS PRESENTED.

The questions presented by petitioners are as follows:

1. Has the United States Emergency Court of Appeals jurisdiction to determine the validity of Office of Price Administration regulations drawn into issue in an indictment for conspiracy under 18 U. S. C. A., Section 88, upon a complaint seasonably filed in that Court pursuant to leave duly granted by the United States District Court in compliance with the provisions of Section 204 (e) (1) of the Emergency Price Control Act of 1942, as amended?

2. Is 18 U. S. C. A., Section 88, (the "dragnet" conspiracy statute) a lawful vehicle for prosecuting alleged agreements to violate Section 5 (a) of the Emergency Price Control Act of 1942, as amended, in view of the specific provision of that section condemning such unlawful agreements as substantive offenses under that section?

3. In the light of its legislative and judicial history, is not intoxicating liquor "sui generis" whose regulation is a matter of local and not federal concern so as to preclude the Price Administrator acting under color of authority presumably granted him by the Emergency Price Control Act of 1942, as amended, from lawfully promulgating regulations purporting to establish maximum ceiling prices for the sale or purchase of intoxicating liquors?

4. Does not the Twenty-first Amendment (Section 2) of the Constitution of the United States exempt intoxicating liquor from regulation under the Emergency Price Control Act of 1942, as amended?

5. In the light of the determination of the court below that it is without jurisdiction to determine the validity of a regulation which forms the substantive basis for a prosecution for conspiracy under 18 U. S. C. A., Section 88, thus depriving the accused of any forum wherein the validity of the regulation in question may be lawfully challenged, does not prosecution under such circumstances constitute a denial of due process?

6. Assuming arguendo that intoxicating liquor is a commodity which may constitutionally be regulated under the Emergency Price Control Act of 1942, as amended, does the establishment by the Price Administrator of maximum ceiling prices for intoxicating liquors subserve any of the purposes contemplated by that Act?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

1. The questions presented for consideration involve the determination of problems of jurisdiction and procedure under an important federal statute which vitally affect the orderly administration of justice. These questions have not been heretofore presented for consideration here and should be settled by this Court.

2. The conclusion of the United States Emergency Court of Appeals that it lacks jurisdiction is in direct conflict with the decision of the Fourth Circuit, United States Circuit Court of Appeals, in *Old Monastery Co.* v. *United States of America* (147 F. (2d) 905), decided February 13, 1945, rehearing denied June 12, 1945.

3. The impact of the Twenty-first Amendment upon the Emergency Price Control Act under which the Price Administrator purports to regulate the local price of intoxicating liquor (assuming that the constitutional question is properly before this Court in the present posture of the case) presents an important question of Federal law which should be settled by this Court.

Wherefore, your petitioners respectfully pray that the writ of certiorari may issue out of and under the hand and seal of this Court directed to the United States Emergency Court of Appeals commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of said United States Emergency Court of Appeals in said cause therein entitled *Martin G. Taub, et al., Complainants,* v. *Chester Bowles, Price Administrator, Respondent,* No. 188, to the end that said cause may be reviewed and determined by this Court and that judgment of said United States Court of Appeals in said cause may be reversed by this Court.

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BRIEF IN SUPPORT OF PETITION.

ON THE QUESTION OF JURISDICTION OF THE UNITED STATES EMERGENCY COURT OF APPEALS.

The Court below held that the legislative history of the amendment of June, 1944, to the Emergency Price Control Act, embodied in the newly added Section 204 (e), clearly disclosed that the Congressional purpose underlying its enactment was to cure the defects in the original Act which were made apparent by the decision of this Court in *Yakus* v. *United States* (321 U. S. 414).[9]

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[9] R. 83-84.

It concluded its analysis of the legislative history and Congressional intent with the following observation:[10]

> "We think it obvious, therefore, that Congress had in mind an amendment which would afford an opportunity to every diligent person charged with violating a regulation or with conspiring to violate it, to have a hearing upon the question of validity."

The court below concludes, however, that although the legislative intent to include indictments for conspiracy to violate regulations under the Emergency Price Control Act was clear, it was equally clear from the language of the amendment as finally enacted that an indictment for conspiracy under 18 USCA, Section 88, was beyond its scope.[11] Relying upon the well established principle of statutory construction that legislative history cannot expand or enlarge the meaning of unambiguous legislative enactments, the Emergency Court arrives at the conclusion that it is without jurisdiction to consider the validity of a regulation drawn into issue under an indictment for conspiracy under 18 USCA, Section 88.[12]

If this conclusion is correct, another immediately emerges as its obvious corollary. If the United States Emergency Court of Appeals is without jurisdiction, then no court has jurisdiction (*Yakus* v. *United States*, 88 L. Ed. 653; *Old Monastery Co.* v. *United States*, 147 F. (2d) 905). From this flows one of two alternatives which, in the final analysis, leads but to one ultimate result, namely, that the conspiracy statute (18 USCA, Section 88) is not a lawful vehicle for prosecuting offenders who agree to violate the Emergency Price Control Act and its regulations.

The first alternative which postulates this inevitable result is that Congress intended to provide a means for prosecution of Office of Price Administration violations which, if

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[10] R. 84.
[11] R. 84.
[12] R. 85.

invoked, would deprive the defendant of an opportunity to challenge the validity of the regulation forming the substantive basis for the criminal charge. Such an alternative is patently untenable. To adopt it would be to disregard the plain Congressional intent underlying enactment of Section 204 (e), whose object as the court below pointed out[13] was to "afford an opportunity to every diligent person charged with violating a regulation or with conspiring to violate it, to have a hearing upon the question of validity." A criminal prosecution under such circumstances would plainly contravene the basic requirements of the Fifth Amendment and would constitute a denial of due process in its grossest form. It certainly would fall far short of the minimal requirements contemplated by this Court in the *Yakus* case (Supra, 88 L. Ed. at 665), when it declared (with reference to restricting judicial review of the administrative determination to a single court):

> "Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process. Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 S. Ct. 318; First Nat. Bank v. Weld County, 264 U. S. 450, 68 L. ed. 785, 44 S. Ct. 385; Anniston Mfg. Co. v. Davis, 301 U. S. 337, 81 L. ed. 1143, 57 S. Ct. 816."

Nor is it any answer to suggest as did the court below that it would have had jurisdiction if the matter had come to it by way of protest from the Price Administrator.[14] The petitioners pursued their remedy under Section 204 (e) which by its terms required, as a condition precedent to the granting of leave to file a complaint in the United States Emergency Court of Appeals, a finding by the District Court that "there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 230 (a)". The District

[13] R. 84.
[14] R. 85.

Court so found.[15] Its order and judgment in that respect was not open to challenge by the Price Administrator in the proceedings below and is conclusive.

The second alternative is that Congress intended to write its own conspiracy statute into the Emergency Price Control Act and thereby made 18 USCA, Section 88 inapplicable to Emergency Price Control violations and obviated the necessity for recourse to that general conspiracy statute to reach such infractions. This conclusion expresses the true Congressional intent. It is spelled out by the specific language of the Act and completely fits the statutory procedural pattern prescribed for challenging the validity of regulations under the Act. Thus, Section 4 (a) not only condemns as unlawful the sale of any commodity in violation of a price schedule, but declares it to be unlawful to offer, solicit, attempt or agree to do any of the foregoing. Consistent with this statutory proscription, Maximum Price Regulation 193, Section 1420.1, not only condemns the selling, buying and delivering of domestic distilled spirits for prices in excess of the regulation, but declares: "... no person shall agree ..." to do any of the foregoing. The same language is found in Maximum Price Regulation 445, Section 7.8: "... and no person shall agree, offer, solicit or attempt to do any of the foregoing."

The inclusion of an agreement to commit an offense within the definition of the substantive offense itself is, so far as Counsel has been able to determine, a statutory anomaly and of itself goes far to support the conclusion that Congress intended in this temporary emergency legislation to provide a separate and exclusive vehicle for prosecutions for conspiracy bottomed upon agreements to violate regulations under the Emergency Price Control Act. This conclusion is given added support by Section 205 (c) of the Act which obviates the problem of venue so often invoked as a justification for the use of 18 USCA, Section 88. Section 205 (c) declares that such criminal proceedings (under Sec-

[15] R. 13.

tion 205) may be brought in any district in which any part of any act or transaction constituting the violation occurred.

When to all the foregoing is added the plain language under Section 204 (e) which so unequivocably encompasses only the Emergency Price Control Act and the regulations promulgated thereunder (see analyses by court below),[16] the conclusion is inescapable that the Emergency Price Control Act contains its own exclusive proscription against conspiracy and that 18 USCA, Section 88, is consequently not available as a vehicle for prosecuting conspiracies to violate Office of Price Administration regulations.

The United States Circuit Court of Appeals for the Fourth Circuit in *Old Monastery Co.* v. *United States* (147 F. (2d) 905) held otherwise upon the precise point here at issue. It quoted with approval from *United States* v. *Chicco and Stauss* (59 F. Supp. 211) which, relying on the *Yakus* case (*Supra*) asserted: "... it follows as an inevitable conclusion that rules or orders promulgated by the Administrator, pursuant to the provisions of the Act, are not subject to attack in the district courts of the United States, whether the case used as the occasion for the attack be civil or criminal ...", and then proceeded to flatly hold that the only forum where such attack could be made was the United States Emergency Court of Appeals, quoting the full text of Section 204 (e) as its authority. (147 F. (2d) 906)

WITH RESPECT TO CONSTITUTIONAL ISSUES.

Petitioners are uncertain as to the propriety of pressing the constitutional issues in the present posture of the case. The decision of the court below was bottomed upon the jurisdictional issue. Holding as it did that it lacked jurisdiction over the complaint, its views upon other issues not being essential to its decision were, as characterized by Justice Laws in his partial dissent, merely "obiter dictum".[17] Whether such dicta afford a proper basis for review by this

[16] R. 84-85.
[17] R. 89.

Court is at least questionable. Petitioners, therefore, confine this portion of the memorandum in support of their petition for a writ of certiorari to a skeletonized reference to those cases wherein this Court has had occasion to consider the impact of the Twenty-first Amendment on the regulation and control of intoxicating liquor.

Board v. *Young's Market Co.*, 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38;
Mahoney v. *Joseph Triner Corp.*, 304 U. S. 401, 58 S. Ct. 592, 82 L. Ed. 1424;
Indianapolis Brewing Co. v. *Liquor Control Commission*, 305 U. S. 391, 59 S. Ct. 254, 83 L. Ed. 243;
Finch v. *McKittrick*, 305 U. S. 395, 59 S. Ct. 256, 83 L. Ed. 245;
Ziffrin v. *Reeves*, 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128;
Carter v. *Commonwealth of Virginia*, 321 U. S. 131, 64 S. Ct. 464, 88 L. Ed. 387.

The substance of these decisions as petitioners view them is that intoxicating liquor is "sui generis" and occupies a unique constitutional classification not applicable to any other article of commerce; that questions pertaining to the regulation and control of liquor are political and by their nature largely within the exclusive domain of the several states so as to exclude them from regulation by national legislation.

Whether, in view of this national policy so firmly imbedded in the law by the repeated pronouncements of this Court, the war power may be invoked as justification for utilizing a temporary federal emergency statute to establish ceiling prices for the sale of intoxicating liquor to the citizens of the several states on the theory that such price limitation subserves the avowed purpose of this wartime legislation, is a question which has not heretofore claimed the attention of this Court.

Moreover, it involves questions of fact which petitioners had no opportunity to develop below. The determination by the United States Emergency Court of Appeals that it

lacked jurisdiction over the complaint effectually barred petitioners from presenting evidence upon which they would have relied to demonstrate the total irrelevance between the maintenance of a low price for liquor to winning the war through attainment of the purposes ascribed to the Emergency Price Control Act by the declaration embodied in Section 1 (a) of that Act.

In the light of facts of which this Court, through its experience with litigation on a subject which has for so long been "the fruitful apple of judicial discord,"[18] might take judicial notice, it may well be that even in the absence of evidence of the character contemplated by the petitioners, this Court may conclude that on its face the national regulation of the price of intoxicating liquor subserves no purpose consonant with the objectives of the Emergency Price Control Act.

Respectfully submitted,

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[18] Concurring opinion of Mr. Justice Frankfurter in Duckworth v. Arkansas, 314 U. S. 390, quoted in R. 67.

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In the Supreme Court of the United States

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v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 82–89) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered June 6, 1945 (R. 90). The petition for a writ of certiorari was

filed July 3, 1945. Jurisdiction of this court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App., Supp. IV, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTIONS PRESENTED

1. Whether Section 204 (e) of the Emergency Price Control Act prior to amendment by the Act of June 30, 1945 authorized the filing of a complaint with the United States Emergency Court of Appeals by a defendant in a prosecution brought pursuant to Section 37 of the Criminal Code.

2. Whether the Twenty-first Amendment to the United States Constitution precludes the establishment under the Emergency Price Control Act of maximum prices for sales of alcoholic beverages.

3. Whether the establishment of maximum prices for sales of alcoholic beverages is in contravention of the Emergency Price Control Act on the ground that such maximum prices do not effectuate the purposes of the Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act and Section 37 of the Criminal Code appear in the Appendix, *infra*, pp. 13–26. The maximum price regulations involved in this proceeding are printed in the Federal Register (7 F. R. 6006; 8 F. R. 11161).

STATEMENT

The petitioners were indicted in the United States District Court for the District of New Jersey for conspiracy to sell alcoholic beverages at prices in excess of the maximum prices established under the Emergency Price Control Act, in violation of Section 37 of the Criminal Code (18 U. S. C., Sec. 88). After arraignment the petitioners, invoking Section 204 (e) of the Emergency Price Control Act, filed with the district court an application for leave to file a complaint in the United States Emergency Court of Appeals setting forth objections to the validity of the maximum prices in question (R. 4–12). The district court granted the application and stayed further proceedings in the criminal prosecution until final determination of the proceeding in the Emergency Court of Appeals (R. 13–15). Petitioners then filed a complaint with the Emergency Court of Appeals, which asserted that the Twenty-first Amendment to the United States Constitution barred Congress from establishing maximum

prices for alcoholic beverages, and that price control for alcoholic beverages violated the terms of the Emergency Price Control Act on the ground that it served none of the purposes of that Act (R. 1–3).[1]

Respondent moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted (R. 16–23) and in addition directed attention to the fact that Section 204 (e) of the Act authorized the filing of such a complaint only by a defendant in a "proceeding, brought pursuant to Section 205" of the Emergency Price Control Act (R. 24). The Emergency Court of Appeals dismissed the complaint (R. 90), holding that it was without jurisdiction and that in any event the complaint was without merit. (R. 82–88.) One judge dissented on the first issue. (R. 88–89.) The court held that the Act did not authorize the filing of a complaint by a defendant in a prosecution brought pursuant to Section 37 of the Criminal Code. The court also considered petitioners' objections to the establishment of maximum prices for alcoholic beverages and held that the complaint failed to state a cause of action (R. 82–89).

Thereafter, by the Act of June 30, 1945, Congress amended Section 204 (e) of the Emergency Price Control Act to authorize the filing of a com-

[1] The complaint also set forth other objections which petitioners have not renewed in the petition or brief.

plaint with the Emergency Court of Appeals by a defendant in a "proceeding, brought pursuant to section 205 *of this Act or section 37 of the Criminal Code.*" [Italicized provision added by amendment.]

ARGUMENT

Petitioners present the question whether Section 204 (e) of the Emergency Price Control Act, prior to amendment, authorized the filing of a complaint with the Emergency Court of Appeals by a defendant in a prosecution under Section 37 of the Criminal Code (Pet. 4). As the opinion below points out, the language of the statute was precise and unequivocal in limiting the right to file such a complaint to a defendant in a "proceeding, brought pursuant to section 205" of the Emergency Price Control Act. Section 205 of the Act prescribes certain procedures for requiring compliance with and punishing violation of maximum price regulations. Petitioners do not deny that the prosecution in the district court was brought pursuant to Section 37 of the Criminal Code, rather than pursuant to Section 205 of the Emergency Price Control Act.[2] Although the

[2] One judge below, dissenting in part, concluded that the indictment would have supported a conviction for violation of the regulations issued by the Price Administrator and that for this reason the proceeding was brought pursuant to Section 205 of the Emergency Price Control Act (R. 88–89). The majority of the Court construed the indictment as authorizing prosecution only under Section 37 of the Crim-

Emergency Court of Appeals recognized that to grant a defendant in a conspiracy prosecution the authority to file a complaint with the Emergency Court of Appeals would have been consistent with the general intent of the Congress, the court quite correctly concluded that in view of the unequivocal language of the statute this procedure had not been authorized.

The correctness of the court's construction of the Act has been confirmed by the subsequent action of Congress. Thus, by Section 6 of the Act of June 30, 1945, Congress amended Section 204 (e) of the Emergency Price Control Act to authorize the filing of a complaint with the Emergency Court of Appeals by a defendant in a proceeding "brought pursuant to section 205 of this Act *or section 37 of the Criminal Code.*" Both the language of this amendment and its legislative history show that Congress recognized that it effected a distinct change in the statute. This amendment, which originated in the course of the conference between representatives of the

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inal Code, and pointed to the sharp distinction which has been maintained between prosecution under the Criminal Code for conspiracy to commit an offense and prosecution for the commission of the offense itself. *United States* v. *Rabinowich*, 238 U. S. 78; *United States* v. *Hirsch*, 100 U. S. 33; *United States* v. *Stevenson*, 215 U. S. 200; *United States* v. *McElvain*, 272 U. S. 633; *Braverman* v. *United States*, 317 U. S. 49. The indictment is not set forth in the record, but petitioners' pleadings support the conclusion of the majority of the court (R. 4, 7).

Senate and House, was explained by Senator Wagner, speaking for the Managers upon the part of the Senate, as follows (91 Cong. Rec., June 28, 1945, at 7063–4):

> Section 6 of the conference agreement amends subsection (e) of section 204 of the Emergency Price Control Act. This subsection now provides that in any enforcement proceeding brought pursuant to section 205 of the Price Control Act, the defendant may obtain leave to institute a special proceeding to test the validity of the regulation or order he is alleged to have violated, and also provides for a stay of the enforcement action during the pendency of the special proceeding testing the validity of such regulation or order. However, the subsection now applies only in the case of actions brought under section 205 where an actual violation of a regulation or order is alleged. It does not apply in cases where the action is brought under the general conspiracy statute, section 37 of the Criminal Code, and the offense charged is conspiring to violate a regulation or order issued under the Price Control Act.
>
> The effect of the present amendment is to extend the application of this subsection to prosecutions for conspiracy to violate price control regulations or orders, so that the defendants in such cases will have an opportunity to test the validity of the regulations or orders which they are

> charged with having conspired to violate, just as defendants in cases under section 205 are given an opportunity to test the validity of the regulations or orders which they are charged with actually having violated.[3]

At no point in the legislative history of the Act of June 30, 1945, is the suggestion made that the decision below incorrectly applied the terms of the statute. On the contrary, it is evident from the foregoing that Congress accepted the correctness of the court's construction of the existing statutory provisions.

This modification of the statute also deprives the decision below of any general significance which otherwise it might have possessed. No other case filed with the Emergency Court of Appeals has raised this issue. Certainly this case alone does not warrant review by this Court of the construction of Section 204 (e) of the Act as it stood prior to the Act of June 30, 1945. As is pointed out more fully in the following portion of this brief, petitioners' objections to the validity of the applicable maximum price regulations were

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[3] The Statement of the Managers on the part of the House, House Report No. 827, 79th Cong., 1st Sess, p. 8, is in part as follows: "Section 6 of the conference substitute makes the amendments in such subsection (e) which are necessary to give to persons prosecuted under section 37 of the Criminal Code, on account of alleged conspiracy to violate any such regulation or order, the rights provided by subsection (e) in the case of civil or criminal proceedings brought under section 205 of the Act."

fully considered on their merits by the Emergency Court of Appeals, and were found to be wholly without substance. But even if additional review of the merits of the petitioners' objections were appropriate, such review could be sought under the provisions of the statute.[4]

There is no conflict with *Old Monastery Co.* v. *United States,* 147 F. 2d 905 (C. C. A. 4) which calls for resolution. That decision affirmed a conviction for conspiracy to violate price regulations in the sale of intoxicating liquors, and rejected the same contentions going to the validity of such a prosecution that petitioner argues collaterally in the present case (Pet. 8–11).[5] The court there, in holding further that the price regulations could not be attacked in a district court, referred to the availability of a remedy under Section 204 (e); but the reference was not a holding and it does

[4] Section 204 (e) of the Act provides that a defendant in a criminal proceeding may apply for leave to file a complaint with the Emergency Court of Appeals either within 30 days after arraignment or within 5 days after judgment. The application which led to the complaint below was filed after arraignment and before judgment, and further trial of the prosecution was stayed pending determination of the proceedings in the Emergency Court (R. 15). If further review of the merits of the case were appropriate, petitioners would be entitled after judgment to file with the district court an application under the provisions of Section 204 (e) of the Act, as amended by the Act of June 30, 1945.

[5] Indeed, the argument in the petition is directed mainly to the asserted lack of due process in the prosecution and to the contention that it could not be founded on Section 37 of the Criminal Code—issues which the Emergency Court could in no event decide.

not appear that the court in that dictum considered the problem of construction decided by the court below. Moreover, as already indicated, the problem has been obviated for the future by Congress.

2. This case does not warrant review by this Court for the further reason that, as shown by the opinion of the Emergency Court of Appeals (R. 85–88), petitioners' objections to the regulations establishing maximum prices for alcoholic beverages were considered and properly held to be without substance. There is plainly no merit in the contention that the Twenty-first Amendment bars Congress from establishing maximum prices for sales of intoxicating liquors. Petitioners have not suggested that the Federal price control program for liquor is in conflict with regulations prescribed by the State of New Jersey for sales of liquor, and apparently base their objection on the assumption that the Twenty-first Amendment reserves to the states exclusive power to regulate intoxicating liquors. This contention, however, has been emphatically rejected by this Court. *United States* v. *Frankfort Distilleries,* 324 U. S. 293; *Jameson & Company* v. *Morgenthau,* 307 U. S. 171. Moreover, attempts to invoke the Twenty-first Amendment as a bar to federal control of maximum prices for sales of intoxicating liquors have been uniformly rejected. *Jatros* v. *Bowles,* 143 F. (2d) 453 (C. C. A. 6); *Old Monastery Co.* v. *United States,* 147 F. (2d) 905 (C. C. A. 4).

The court below was likewise clearly correct in rejecting petitioners' contention that regulations establishing maximum prices for sales of intoxicating liquors are invalid under Section 2 (a) of the Emergency Price Control Act on the ground that such regulations do not effectuate the purposes of the Act.[6] As the court pointed out, the regulations fall squarely within the objective "to stabilize prices", listed at the outset of Section 1 (a) which states the purposes of the Act. Moreover, the Emergency Court of Appeals has consistently adhered to the view that no single commodity can be excepted from price control as a matter of law without threatening the stability of prices for other commodities. *Philadelphia Coke Company* v. *Bowles*, 139 F. 2d 349 (E. C. A.); *Lincoln Savings Bank of Brooklyn* v. *Brown*, 137 F. 2d 228 (E. C. A.). The considerations underlying this rule were thus stated in the opinion below (R. 87):

> We have declared it entirely realistic when inflationary pressure enters upon the stage as a major force affecting the public economy, to refuse to except the price of

[6] Section 2 (a) of the Act provides: "Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."

> liquor or of any other single commodity from others and to refuse to treat any commodity as located in an economic vacuum removed from other human transactions on the ground that it constitutes no threat of an inflationary increase in prices. In achieving stabilization, the price of any and every commodity freely and openly dealt in is a factor affecting results. The omission of one or more articles, whatever their character, may upset the entire plan.

In sum, the question of jurisdiction which the petition seeks to present not only is no longer of general importance, but is not of further importance in this case itself, in view of the independent alternative ground of decision, dealing with the merits, which in no event would warrant review.

CONCLUSION

The case was rightly decided and presents no substantial question of general importance. The petition should be denied.

Respectfully submitted.

HAROLD JUDSON,
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RICHARD H. FIELD,
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JULY 1945.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., are as follows:

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner pro-

vided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

* * * * *

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.

* * * * *

SEC. 203. (a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and

affidavits or other written evidence in support of such objections.

* * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding:

* * * * *

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from

time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347).

The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Section 204 (e) prior to amendment by the Act of June 30, 1945, was as follows:

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave

to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the pro-

ceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding

brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

Section 204 (e) as amended by the Act of June 30, 1945, is as follows (provisions added by amendment in italics):

SEC. 6. Section 204 (e) of the Emergency Price Control Act of 1942, as amended, is amended to read as follows:

"(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 *of this Act or section 37 of the Criminal Code,* involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a).

Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

"(2) In any proceeding brought pursuant to section 205 *of this Act or section 37 of the Criminal Code,* involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

"(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

"(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 *of this Act or section 37 of the Criminal Code,* setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

"(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the

expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provisions of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon the violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 *of this Act or section 37 of the Criminal Code;* nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206."

SEC. 205. (a) Whenever in the judgment of the Administrator any person has en-

gaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as pro-

vided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found: *Provided, however,* That all suits under subsection (e) of this section shall be brought in the district or county in which the defendant resides or has a place of business, an office, or an agent. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. In any suit or action wherein a party relies for ground of

relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The administrator may intervene in any such suit or action.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge.

* * * * *

(f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable.

* * * * *

Section 37 of the Criminal Code, 18 U. S. C. sec. 88 is as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

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